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Supreme Court, U.S.
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No. 98-1161

In The
Supreme Court of the United States
October Term, 1998

CITY OF ERIE, et al.,
Petitioner,

v.

PAP'S A.M., t/d/b/a KANDYLAND,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF THE ERIE COUNTY CITIZEN'S COALITION AGAINST VIOLENT PORNOGRAPHY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE
TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Amicus Curiae Erie County Citizen's Coalition Against Violent Pornography has sought the consent of the parties to participate in this matter by filing of the enclosed brief. A consent letter from the Petitioner, the City of Erie, is on file with the Clerk in accordance with Rule 37.3. However, the Respondent, PAP'S A.M., t/d/b/a/ Kandyland, has withheld consent, necessitating this motion.

This motion and the enclosed brief are filed in support of the Petitioner City of Erie, to inform the Court of the interests of the residents of the local community to maintain their ability to regulate public nudity on the grounds that the residents have made a moral decision to disallow public nudity in their community and to show how the decision in *Barnes v. Glen Theater, Inc., et al.*, 501 U.S. 560 (1991) has been ignored by the Pennsylvania Supreme Court to reach a decision that is inconsistent with this Court's prior decisions. Moreover, with the Pennsylvania Supreme Court's decision, there is now disagreement between lower courts interpreting this Court's holding in *Barnes*.

As set forth more fully in the "Interest of the Amicus Curiae" section of the attached brief, the Erie County Citizen's Coalition Against Violent Pornography is a group comprised of residents of Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography and public nudity, including nude dancing at business establishments like Kandyland. Under the ordinance passed by the City of Erie, dancers at establishments like Kandyland were not permitted to dance totally nude. The dancers were required to wear "pasties" and "G-strings" to avoid being nude under

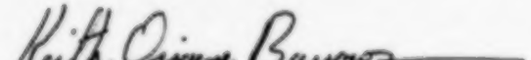
the ordinance. While the Coalition would have preferred to not have the dancing establishment in existence at all, the Coalition has recognized the complexities of the law and regarded the ordinance as a satisfactory regulation of pornography and public nudity. However, since the Pennsylvania Supreme Court's ruling that overturned the statute, the dancers at the club are now dancing in full nudity.

The experience of the Amicus Curiae of dealing with the nude dancing establishment both before and after the ordinance was enacted offers an important practical aspect and analytical perspective on the issues presented by this case. In the instant case, the Amicus Curiae has experience with the nude dancing establishment's secondary effects that the ordinance would help prevent if enforced. From the perspective of the amicus curiae, the question of whether the Court should grant certiorari and ultimately review the Pennsylvania Supreme Court's decision involves more than just a simple examination of *stare decisis* and application of this Court's decision in *Barnes v. Glen Theater, Inc. et al.* The issue for the Amicus Curiae involves the fundamental judgment of whether or not public nudity can be regulated by a local governing body on the basis of moral concerns of the community and the interest of preventing the harmful secondary effects that accompany such establishments.

Amicus Curiae thus has a direct and important interest in the review of this case by this Court, and has a valuable perspective to offer concerning the legal issues presented therein. Amicus Curiae therefore respectfully urges that the Court grant this Motion For Leave To File

Brief *Amicus Curiae* in Support of Petition For Writ of Certiorari.

Respectfully submitted,



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QUESTION PRESENTED

Whether a petition for writ of certiorari should be granted to the Pennsylvania Supreme Court in the instant case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT EXISTS BETWEEN LOWER COURTS' APPLICATIONS OF THIS COURT'S HOLDING IN *BARNES V. GLEN THEATER, INC., ET AL.*	4
A. *Barnes v. Glen Theater, Inc, et al.*, Established The Legal Boundaries For The Regulation Of Nude Dancing	5
B. The Lower Court's Decision Below Creates A Conflict With Other Courts That Have Applied *Barnes v. Glen Theater, Inc., et al.*, To Uphold The Regulation Of Nude Dancing	7
II. THE LOWER COURT IGNORED THIS COURT'S HOLDING IN *BARNES V. GLEN THEATER, INC., ET AL.*, TO REACH A DECISION INHERENTLY IN CONFLICT WITH THE PRIOR DECISIONS OF THS COURT	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:	Page
Barnes v. Glen Theater, Inc, et al., 501 U.S. 560 (1991)	passim
Bowers v. Hardwick, 478 U.S. 186 (1986)	6
Café 207 Inc., v. St. John's County, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd per curiam* 66 F. 3d 272 (11th Cir. 1995), *cert. denied* April 17, 1996	5, 8
Dallas v. Stanglin, 490 U.S. 19 (1989)	7
Déjà Vu of Nashville Incorporated, et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al., (Mem Opin. And Order, M.D. Tenn. June 30, 1994)	5, 9
Mitchell v. Commonwealth Adult Entertainment Establishment of Delaware, 10 F.3d 123 (3rd Cir. 1993)	5, 8
O'Malley v. City of Syracuse, 813 F. Supp. 133 (N.D. N.Y. 1993)	5, 9
PAP'S A.M., t/d/b/a/ Kandyland v. City of Erie, et al., 719 A.2d 273 (1998)	passim
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)	6
SBC Enterprises and Shawn B. Cliche v. City of South Burlington, 892 F. Supp. 578 (D.C. Vt. 1995)	5, 9
Triplett Grille Inc. v. Akron, 816 F. Supp. 1249 (N.D. Ohio 1993) *aff'd* 40 F. 3d 129 (6th Cir. 1994).	5, 8
United States v. O'Brien, 391 U.S. 367 (1968)	3, 6, 12

TABLE OF AUTHORITIES (continued)

Page

STATUTES:

Indiana Code § 35-45-4-1 (1988)..... 6

INTEREST OF AMICUS CURIAE*

Amicus curiae, the Erie County Citizen's Coalition Against Violent Pornography is a non-profit organization domiciled in the Commonwealth of Pennsylvania, and located in Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography, including public nudity such as the type that is the subject of the instant case. The Coalition seeks to educate citizens in the legal and peaceful means available to them to oppose the spread of establishment of pornography in their communities.

The City of Erie attempted to regulate the public nudity at Kandyland by enacting an ordinance that required the dancers to wear modest coverings over parts of the female anatomy, commonly known as "pasties" and "G-strings." The City's ordinance was virtually identical to the Indiana statute this Court declared constitutional in *Barnes v. Glen Theater, Inc., et al.*, 501 U.S. 560 (1991), as not unduly restricting a dancer's First Amendment right to freedom of expression. Some of the dancers and the owner of Kandyland challenged the ordinance, and eventually succeeded in having the statute overturned by the Pennsylvania Supreme Court.

The members of the Coalition live in the vicinity of the nude dancing establishment operated by the Respondent in the instant case. Kandyland is located in a residential area, and as such has an impact on the residents that live in the community near Kandyland. Moreover, residents of the community near Kandyland have asked the members of the Coalition for assistance in dealing with the existence of

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* No other person other than Counsel of Record has contributed to the authoring of this brief, in whole or in part, and no person or entity other than amicus curiae has made a monetary contribution to the preparation or submission of this brief.

Kandyland in their neighborhood, as well as with dealing with the secondary effects that have accompanied Kandyland's operations. Thus, the resolution of the instant case will have a direct impact on the members of the Coalition and on their community at large as well.

Because the city's ordinance has been overturned by the Pennsylvania Supreme Court, the dancers at Kandyland have returned to dancing without any clothing in full public nudity. Thus, where the city's residents spoke through their council members to enact an ordinance restricting public nudity to a constitutionally permissible extent, the Pennsylvania Supreme Court has interjected an incorrect and untenable decision that ignores this Court's precedent to overturn the decision of the city council members. Amicus Curiae urges this Court to grant the petition for writ of certiorari in this case and to reverse the decision of the Pennsylvania Supreme Court.

SUMMARY OF ARGUMENT

PAP'S A.M. v. City of Erie, et al., 719 A.2d 273 (1998), was wrongly decided and should be overturned. The correct rule of law in this case is supplied by this Court's decision in *Barnes v. Glen Theater, Inc., et al.*, 501 U.S. 560 (1991), where this Court held that nude dancing may be regulated by statute so long as the statute meets the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

Prior to the Pennsylvania Supreme Court's decision in the instant case, other lower courts have abided by this Court's holding in *Barnes* and upheld similar statutory constructions that restrict nude dancing. However, now that the Pennsylvania Supreme Court has ignored the precedential value of the *Barnes* decision, a conflict exists between lower courts on the issue of constitutionally permissible regulation of nude dancing. This case presents an appropriate occasion for resolving the conflict, and this Court should grant the petition for writ of certiorari.

The Pennsylvania Supreme Court's decision in the instant case is simply incorrect. The Pennsylvania court recognized that a majority of this Court recognized that nude dancing may be regulated in accordance with the requirements of *O'Brien*, but the Pennsylvania court flatly ignored this Court's decision in *Barnes*. Instead, the Pennsylvania Supreme Court applied the rationale of the dissent authored by Justice White in *Barnes* in order to find that the statute unreasonably restricted a dancer's First Amendment rights. This decision by the Pennsylvania Supreme Court has therefore turned the precedential value of this Court's decisions completely around, and in reverse.

Amicus curiae will make two broad points in this brief: First, that the Court should review this case and grant a writ of certiorari because a conflict exists among the lower courts as to the proper interpretation and application of this Court's decision in *Barnes*. Second, the statutory scheme endorsed by *Barnes* and used in the instant case is still a valid expression of a community's judgment to restrict public nudity and does not run afoul of the First Amendment. In making these points, we will argue the similarity of the instant case to the scenario this Court was presented with in *Barnes*.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT THAT EXISTS BETWEEN LOWER COURTS' APPLICATIONS OF THIS COURT'S HOLDING IN *BARNES V. GLEN THEATER, INC., ET AL.*

The question presented at this stage in the proceedings in this case is whether the Court should grant a writ of certiorari to the Pennsylvania Supreme Court to review the decision in *PAP'S A.M. t/d/b/a/ Kandyland v. City of Erie, et al.*, 719 A.2d 273 (1998). Ultimately, the issue underlying the limited question of whether to grant the writ of certiorari is whether nude dancing can be regulated in the manner presented by the City of Erie's ordinance without unreasonably restricting a dancer's right to freedom of expression under the First Amendment.

Since this Court's decision in *Barnes v. Glen Theater, Inc., et al., supra*, it has been widely acknowledged that a government may regulate nude dancing by requiring minimal amounts of clothing to be worn by the dancer. This Court has not reversed the decision in *Barnes*, nor has there

been a significant challenge to *Barnes* since the decision, and thus *Barnes* represents this Court's ruling on the question of the regulation of nude dancing, and is the rule of law.

Lower courts have consistently made decisions in accordance with *Barnes* since 1991, at least until the Pennsylvania Supreme Court's decision in the instant case.[1] Perhaps most important is that the United States Court of Appeals for the Third Circuit has held that *Barnes* is the authority on the regulation of nude dancing in *Mitchell v. Commonwealth Adult Entertainment Establishment of Delaware*, 10 F.3d 123 (3rd Cir. 1993). Thus, not only is there a conflict amongst the other federal courts and the Pennsylvania Supreme Court in this area of the law, there is a direct conflict between the highest appellate authority in Pennsylvania and the Court of Appeals for the Third Circuit, which has as part of its jurisdiction, the Commonwealth of Pennsylvania.

A. *Barnes v. Glen Theater, Inc, et al.*, Established The Legal Boundaries For The Regulation Of Nude Dancing

This Court's holding in *Barnes* is the rule of law concerning questions involving the regulation of public nudity, and hence nude dancing. The *Barnes* decision held that nude dancing may be regulated by statute so long as

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[1] See *Café 207 Inc., v. St. John's County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd per curiam* 66 F. 3d 272 (11th Cir. 1995), *cert. denied* April 17, 1996; *SBC Enterprises and Shawn B. Cliche v. City of South Burlington*, 892 F. Supp. 578 (D.C. Vt. 1995); *O'Malley v. City of Syracuse*, 813 F. Supp. 133 (N.D. N.Y. 1993); *Déjà Vu of Nashville Incorporated, et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, (Mem Opin. And Order, M.D. Tenn. June 30, 1994); *Triplett Grille Inc. v. Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993) *aff'd* 40 F. 3d 129 (6th Cir. 1994).

the statute meets the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

The *Barnes* case involved a statute enacted by the Indiana legislature that provided that a person committed a misdemeanor if they appeared nude in public.[2] The statute was challenged by two establishments that desired to provide totally nude dancing as entertainment, and individual dancers at the establishments that desired to dance totally nude for customers. The challenge was based on the argument that the First Amendment's guarantee to freedom of expression prevented the State of Indiana from enforcing the prohibition against full nudity, and as applied to the respondents, from providing totally nude dancing.

The Court applied the four-part analysis of *O'Brien* to reach its result. First, examining the statute's history and purpose, the Court found that statute was "designed to protect public morals and public order." *Barnes* at 569. Thus, the statute was within the constitutional power of the State as part of the traditional police power of the State. *Barnes* at 569. Secondly, in accordance with *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) and *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court found that the statute "further[ed] a substantial government interest in protecting order and morality." *Barnes* at 569. Third, the Court found that the government's interest in protecting

[2] Indiana Code § 35-45-4-1 (1988) provided: "Public indecency; indecent exposure. Sec. 1. (a) A person who knowingly or intentionally, in a public place: (1) engages in sexual intercourse; (2) engages in deviate sexual conduct; (3) appears in a state of nudity; or (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor. (b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."

order and morality was unrelated to the suppression of free expression, applying the analysis from *Dallas v. Stanglin*, 490 U.S. 19 (1989), where the Court refused to find that every activity contains a "kernel of expression," and that therefore any type of activity that contains any amount of expression is protected by the First Amendment. *Barnes* at 570. Thus, the court determined that the statute was unrelated to the suppression of free expression because public nudity was the "perceived evil" that the statute sought to address, not nude dancing. *Barnes* at 571. Finally, the Court held that the incidental restriction on the First Amendment freedom of the respondents was narrowly tailored and was the bare minimum necessary to achieve the State's purpose. *Id.* at 572. Thus the Court rejected the respondent's claims and held that the statute was a proper exercise of the State's police power and that it met the four-prong test enunciated in *O'Brien, supra*.

This Court has not overturned the *Barnes* decision, not has it greatly expanded upon the underlying analysis upon which *Barnes* is based. Therefore, *Barnes* is for all intents and purposes, the rule of law in a case involving the regulation of public nudity as applied to nude dancing, and the lower courts subject to the oversight of the Court are bound by the decision.

B. The Lower Court's Decision Below Creates A Conflict With Other Courts That Have Previously Applied *Barnes v. Glen Theater, Inc., et al.*, To Uphold The Regulation Of Nude Dancing

Since this Court's decision in *Barnes*, there have been several decisions by lower courts considering the regulation of nude dancing. All of the decisions prior to the Pennsylvania Supreme Court's decision have recognized the

authority of the *Barnes* plurality decision as the rule of law. The courts have not always upheld the regulation of public nudity, but they have all recognized that *Barnes* was this Court's expression of the law on the issue and was therefore binding.

In *Mitchell v. Commonwealth Adult Entertainment Establishment of Delaware*, 10 F.3d 123 (3rd Cir. 1993), the court considered a Delaware ordinance that regulated nude dancing by requiring dancing booths to be open to the public portions of an adult bookstore. The court applied the *Barnes* decision in upholding the statute's regulation of nude dancing. The court noted the statute's purpose in ameliorating the secondary effects of nude dancing and quoted from the *Barnes* decision as authority for upholding the statute as constitutional.

In *Triplett Grille Inc. v. Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993) *aff'd* 40 F. 3d 129 (6th Cir. 1994), the court applied the *Barnes* decision and rationale in considering an ordinance passed by the City of Akron, Ohio. Although the court found the ordinance unconstitutional, it did so because the ordinance lacked the requisite basis in preventing secondary effects from nude dancing, as enunciated in Justice Souter's concurring opinion in *Barnes*. Although the court failed to uphold the particular ordinance, the court recognized that the *Barnes* decision was the authoritative statement of the law on the issue.

In *Café 207 Inc., v. St. John's County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd per curiam* 66 F. 3d 272 (11th Cir. 1995), *cert. denied* April 17, 1996, the district court considered whether an ordinance that was more restrictive than the ordinance in *Barnes* and the instant case violated the First Amendment's protections. The ordinance at issue required more clothing than just "pasties" and "G-strings."

The court upheld the ordinance against a challenge that the ordinance was overbroad and vague. The court rejected those claims, finding that the ordinance contained legislative intent similar to the intent found in the ordinance enacted in Erie, Pennsylvania.

In *SBC Enterprises and Shawn B. Cliche v. City of South Burlington*, 892 F. Supp. 578 (D.C. Vt. 1995), the court upheld an ordinance similar to the ones enacted in *Barnes* and the instant case as constitutional. The court acknowledged the *Barnes* decision as the final word on the issue of regulation of nude dancing as far as the U.S. Supreme Court was concerned.

In *O'Malley v. City of Syracuse*, 813 F. Supp. 133 (N.D. N.Y. 1993), the court considered an ordinance passed by the City of Syracuse that was similar to the *Barnes* ordinance. In similar fashion to the cases cited above, the court recognized the *Barnes* plurality decision as authority and upheld the regulation of nude dancing against constitutional challenges.

Finally, the District Court for the Middle District of Tennessee considered a similar ordinance in *Déjà Vu of Nashville Incorporated, et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, (Mem. Opin. and Order, M.D. Tenn. June 30, 1994). In that decision, the court upheld an statute's regulation of nude dancing as constitutional, relying on *Barnes*.

With the Pennsylvania Supreme Court's decision below, there now exists a conflict among lower courts as to the applicability of this Court's decision in *Barnes*. The Court is urged to grant the petition for a writ of certiorari to resolve the conflict the Pennsylvania Supreme Court's decision has created.

II. THE LOWER COURT IGNORED THIS COURT'S HOLDING IN *BARNES V. GLEN THEATER, INC., ET AL.*, TO REACH A DECISION INHERENTLY IN CONFLICT WITH THE PRIOR DECISIONS OF THS COURT

The Pennsylvania Supreme Court went to great lengths to circumvent this Court's holding and rationale in *Barnes*. In order to effect its circumvention, the court below first determined that the *Barnes* decision was a "hodgepodge" of decisions, and that "no clear precedent ar[ose] out of *Barnes* on the issue of whether the Ordinance in the matter sub judice passe[d] muster under the First Amendment." *Erie* at 278. The court determined that because *Barnes* was a plurality decision, it undertook the tack of determining if any of the various opinions in *Barnes* commanded a majority of the votes by the Court. Finding none, and thus finding no precedential authority in the plurality or concurring opinions in *Barnes*, the court instead found Justice White's dissent to be authoritative. *Id.*

In striking out on its own analysis, the court below embraced Justice White's dissent to find that the ordinance in Erie was content-based, despite the fact that the plurality opinion in *Barnes* determined that essentially the same ordinance was not content-based. *Erie* at 279. The court quoted from Justice White's dissenting opinion, which is at direct odds with the Court's own opinion in *Barnes*:

> it cannot be [said] that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication.

Id. (citing *Barnes* at 592). However, the Pennsylvania court's application of this particular portion of Justice White's dissent is at direct odds with the plurality opinion wherein it found that the Indiana statute did not apply to nude dancing because of the erotic message conveyed by the dancers, but rather it applied the statute to all forms of public nudity, not just nude dancing. *Barnes* at 571. Such an analysis by the Pennsylvania Supreme Court, if left to stand, can only lead to further confusion and incongruence among lower courts. It is fundamental that the United States Supreme Court is the final authority on matters of constitutional construction, and it does not need repeating by the Amicus Curiae. Nevertheless, the Pennsylvania Supreme Court has determined that it can strike out on its "own independent analysis" when the United States Supreme Court precedent does not meet with its liking. *Erie* at 280.

Having found that the Erie ordinance was content-based, the Pennsylvania Supreme Court embarked upon the erroneous application of the strict scrutiny test, which is required for a content-based regulation to pass constitutional muster. *Erie* at 279-80. Once the court was in the arena of a strict scrutiny analysis, it no longer had to deal with the uncomfortable analysis of *Barnes* because the *Barnes*

decision was based on application of the four-prong test of *United States v. O'Brien, supra.*

In applying the strict scrutiny test, the court noted that the appellees, the City of Erie, had not presented a strict scrutiny analysis in their briefs to the court, and that such a failure was alone justification for finding that the strict scrutiny test was not met. *Erie* at 280. How the court could have made such an incomprehensible argument is beyond fathom, because the failure to present a strict scrutiny analysis was due to proper reliance on this Court's holding and analysis in *Barnes*. It is apparent to Amicus that several other lower courts had recognized that *Barnes* was the rule of law as far as these issues were concerned, yet the Pennsylvania Supreme Court missed that point. The strict scrutiny analysis should not have been addressed by the Pennsylvania Supreme Court at all, yet it is precisely what the court determined the outcome of the case upon, in direct contravention of this Court's precedent.

The Pennsylvania court ultimately found that the Erie ordinance failed because the ordinance was not narrowly tailored to meet the state's compelling interest. The court held that the ordinance could have contained other restrictions on the social ills the ordinance aimed to prevent without regulating the expressive conduct of the nude dancing in question. However, because the court's analysis in applying the strict scrutiny test was inherently flawed in the first instance, its conclusion is similarly flawed and erroneous.

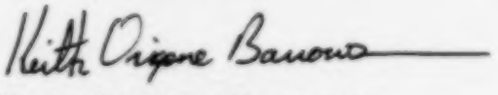
The inherent flaws in the Pennsylvania Supreme Court's decision cry out for reversal by this Court. This Court cannot let stand a decision by the highest court of a State that flagrantly defies clearly applicable precedent. The Pennsylvania Supreme Court's decision was not based upon

an arguable extension of the law or a colorable interpretation of United States Supreme Court precedent. Rather, it was fashioned upon "independent analysis" after flagrant circumvention, of the *Barnes* decision, followed by application of the rationale of a dissenting opinion. Such an application of a higher court's decisions cannot stand, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The judgment of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,



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